

Talking Points on MPAA Effective Date/Interim Population Proposal

It is imperative that the first wave of Plug & Play and DTV Tuner Mandate devices recognize and respond to the Flag, so that an immediate, substantial, and enduring legacy of devices is not created.

The MPAA proposal for the effective date for the Broadcast Flag regulation is as follows:

- Generally, devices will have 18 months from publication of the regulation to comply.
- *New* Plug & Play devices, and devices that would be subject to the DTV Tuner Mandate, *that are equipped with digital outputs*, would have to be compliant by July 1, 2004. Older models and devices without digital outputs would have 18 months to be compliant.
- Manufacturers can apply for a waiver from the Commission if they can demonstrate that they are already “committed” (as of now, to prevent gaming of the system) to producing non-compliant products.

In order to meet the deadline for new Plug & Play devices and DTV Tuner Mandate devices, it is essential that some Table A technologies be listed *on the day the regulation is released*, at least on an interim basis, so that manufacturers can construct their boxes with certainty and direct Flag content to Plug & Play-compliant outputs and recording capabilities.

- The MPAA proposes that, for an interim population of Table A, the Commission should list those technologies identified through the PHILA and DFAST licenses. In other words, what’s good enough for Plug & Play will be good enough for the Broadcast Flag for the 2004 manufacturing season, and manufacturers will need only to direct content marked with the Flag to the very same outputs and recorders CE manufacturers agreed to in the Plug & Play MOU.

Some have proposed an “expedited proceeding” to select Table A technologies. The practical effect of this proposal is to delay implementation of the Broadcast Flag for up to a year, or longer. Even if Table A technologies were approved by Jan. 1, 2004, allowing for an eighteen-month production cycle would place Broadcast Flag compliant devices on the market in July of 2005. By that time, an entire year’s production of Plug & Play devices will have flooded the marketplace --devices that will not recognize or respond to the Broadcast Flag. Effective protection against Internet redistribution will be delayed for years, if not permanently.

Some claim that the proposed interim population of Table A would give one content protection technology, 5C, a first-mover advantage in the marketplace. This is a red herring. First, the Commission’s Plug & Play Order, which CE manufacturers essentially helped craft, has already blessed 5C. All Plug & Play compliant devices will contain 5C protected digital outputs. Placing the 5C technology on Table A immediately, and requiring Plug & Play devices to utilize that technology to implement the Broadcast Flag, will not increase that advantage. Failing to do so will not diminish that advantage. But it will diminish, if not destroy, the effectiveness of the Broadcast Flag. Second, if a CE manufacturer wishes to use a technology other than 5C for the

Broadcast Flag, it need only wait for the Commission's expedited process to conclude. And, last, it should be noted that the ONLY CE company arguing that there will be a first-mover advantage is Philips –which has not proffered any technology of its own for Table A.

Some CE manufacturers have claimed that they cannot meet a July 1, 2004 deadline for the Broadcast Flag because it was not as “clear” as the Plug & Play proposal. But there was nothing certain about the Plug & Play regulation before the Commission adopted it. While the MOU had been agreed to, there was no assurance it would be adopted in that form. Similarly, the basic terms of the Broadcast Flag rules have been public since the BPDG Co-Chair's report was issued June 3, 2002. By contrast, the Plug & Play MOU was published only on December 19, 2002.

Remember: When it adopted the Plug & Play rules, the FCC did, in effect, establish technology mandates.

Nor is “voluntary compliance” with the Flag regulation sufficient. Any manufacturer that can voluntarily comply with the Flag regulation can voluntarily choose not to comply. If voluntary action were sufficient, there would not have been the need for these proceedings before the FCC. Those manufacturers that can meet the July 1, 2004 deadline should be required to, and those that truly cannot can seek a waiver. Failure to require compliance will create uncertainty and punish those companies that are prepared to comply by allowing their competitors to market non-compliant devices. Manufacturers clearly understand the importance of a mandate: While they could have voluntarily produced plug and play devices, they sought the FCC's mandate so that no one manufacturer would have a competitive advantage over any other.

The bottom line issue here is, and always has been, a level playing field for broadcasters. The Commission has acted to insure that cable and satellite programming will be protected against unauthorized Internet redistribution. That protection will be provided in Plug & Play compliant devices sold to consumers next year. There is no technological or business obstacle to these devices also being Broadcast Flag compliant.

The FCC has established hard deadlines for broadcasters to construct and operate DTV stations and that those stations transmit digital content. Yet, the FCC is demanding that broadcasters do so without protection of that content.

The decision before the Commission is whether over-the-air broadcasters will be given a level playing field with cable and satellite delivery systems, or whether broadcasters will have to compete for high quality programming with one hand tied behind them.

The public interest in free, local, over-the-air broadcasting requires the Commission to reject calls for delay and to provide redistribution protection to broadcast content NOW, as it has already done for cable and satellite content.